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DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Part 748

[Docket No. 110804481-1527-01]

RIN 0694-AF32

Amendment to Existing Validated End-User Authorizations in the People's Republic of China:
National Semiconductor Corporation and Semiconductor Manufacturing International
Corporation

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Final rule.

SUMMARY: In this rule, the Bureau of Industry and Security (BIS) amends the Export Administration Regulations (EAR) to remove National Semiconductor Corporation (National Semiconductor) from the list of "Validated End-Users" and "Eligible Destinations" in the People's Republic of China (PRC). BIS also removes one facility from the list of "Eligible Destinations" for Semiconductor Manufacturing International Corporation (SMIC) in the PRC, the Semiconductor Manufacturing International (Chengdu) Corporation, Assembly and Testing (AT2) Facility (SMIC AT2 facility). These amendments are due to material changes in the ownership and control of National Semiconductor and the SMIC AT2 facility. These amendments are not the result of activities of concern by National Semiconductor or SMIC and do not establish any new license requirements or licensing policies for exports, reexports, or transfers (in-country) of items to National Semiconductor, SMIC, or their facilities.

DATES: This rule is effective [INSERT DATE OF PUBLICATION].

FOR FURTHER INFORMATION CONTACT: Karen Nies-Vogel, Chair, End-User Review Committee, Bureau of Industry and Security, U.S. Department of Commerce, 14th Street & Pennsylvania Avenue, NW, Washington, DC 20230; by telephone: (202) 482-5991, by fax: (202) 482-3991, or e-mail: ERC@bis.doc.gov.

SUPPLEMENTARY INFORMATION:

Background

Authorization Validated End-User (VEU)

BIS amended the EAR in a final rule on June 19, 2007 (72 FR 33646), creating a new authorization for “validated end-users” (VEUs) located in eligible destinations to which eligible items may be exported, reexported, or transferred (in-country) under a general authorization instead of a license, in conformance with section 748.15 of the EAR. VEUs may obtain eligible items that are on the Commerce Control List, set forth in Supplement No. 1 to Part 774 of the EAR, without having to wait for their suppliers to obtain export licenses from BIS. Eligible items may include commodities, software, and technology, except those controlled for missile technology or crime control reasons.

The VEUs listed in Supplement No. 7 to Part 748 of the EAR were reviewed and approved by the U.S. Government in accordance with the provisions of section 748.15 and Supplement Nos. 8 and 9 to Part 748 of the EAR.

Amendment to Existing Validated End-User Authorizations for the PRC

Removal of VEU Authorization for National Semiconductor Corporation (National Semiconductor)

In a rule published in the *Federal Register* on October 19, 2007 (72 FR 59164), BIS designated National Semiconductor as a VEU and identified three of its facilities (NSC VEU facilities) as “Eligible Destinations,” thus authorizing exports, reexports, and transfers (in-country) of certain eligible items to the three eligible facilities under Authorization VEU. Due to a material change in the ownership and control of National Semiconductor, National Semiconductor asked that its VEU authorization be ended. Accordingly, consistent with section 748.15 of the EAR, BIS now amends Supplement No. 7 to Part 748 of the EAR to remove National Semiconductor from the list of approved VEUs and eligible destinations. As a result of this rule, National Semiconductor Corporation and the NSC VEU facilities at the following addresses are no longer authorized to receive items under Authorization VEU:

National Semiconductor Hong Kong Limited
Beijing Representative Office
Room 604, CN Resources Building
No. 8 Jianggumenbei A
Beijing, China
100005

National Semiconductor Hong Kong Limited
Shanghai Representative Office
Room 903-905 Central Plaza
No. 227 Huangpi Road North
Shanghai, China
200003

National Semiconductor Hong Kong Limited
Shenzhen Representative Office
Room 1709 Di Wang Commercial Centre
Shung Hing Square
5002 Shenna Road East
Shenzhen, China
518008

This amendment is made due to a material change in the ownership and control of National Semiconductor and is not the result of activities of concern by National Semiconductor or the NSC VEU facilities. This action does not establish any new license requirements or licensing policies for exports, reexports or transfers (in-country) of items to National Semiconductor. Rather, the license requirements set forth in the EAR continue to apply to this entity and its facilities. Parties seeking to export, reexport or transfer (in-country) items under the EAR to National Semiconductor or these facilities may now have to obtain a license to do so, depending on the item at issue.

All conditions and restrictions that applied to transactions that were undertaken pursuant to Authorization VEU prior to the effective date of this amendment that involved National Semiconductor or the NSC VEU facilities continue to apply to those transactions. These restrictions and conditions include any that were imposed on National Semiconductor or the NSC VEU facilities in connection with its eligibility for Authorization VEU, as established by BIS in its communications authorizing National Semiconductor's participation in the VEU program.

Removal of Semiconductor Manufacturing International (Chengdu) Corporation, Assembly and Testing (AT2) Facility (SMIC AT2 Facility) from the List of VEU Semiconductor Manufacturing International Corporation's (SMIC's) Approved Facilities in the PRC

In a rule published in the *Federal Register* on October 19, 2007 (72 FR 59164), BIS designated SMIC as a VEU, thus authorizing certain specific exports, reexports and transfers (in-country) to five listed facilities of the company, including the SMIC AT2 facility. Due to a material change in the ownership and control of the SMIC AT2 facility, SMIC has requested that BIS remove that facility's VEU authorization. Accordingly, in this rule, BIS further amends Supplement No. 7 to Part 748 of the EAR to remove the SMIC AT2 facility and its address (8–8 Kexin Road, Export Processing Zone (West Area), Chengdu, China 611731) from the list of SMIC's authorized VEU facilities. This change leaves three SMIC facilities that are approved to receive eligible items under SMIC's VEU authorization.

As a result of this rule, the SMIC AT2 facility is no longer authorized to receive items under Authorization VEU. Thus, parties seeking to export, reexport, or transfer (in-country) items under the EAR to the SMIC AT2 facility may now need to obtain a license to do so, depending on the item at issue.

This amendment is made due to a material change in the ownership and control at the SMIC AT2 facility and is not the result of activities of concern by the SMIC AT2 facility or SMIC. SMIC remains a qualified participant in the VEU program, and thus exports, reexports and transfers (in-country) of the items controlled under the ECCNs listed in SMIC's entry in Supplement No. 7 to Part 748 of the EAR to the SMIC facilities listed in the same part may continue to be made under Authorization VEU. This action does not establish any new license requirements or licensing policies for exports, reexports or transfers (in-country) of items to the

SMIC AT2 facility. Rather, the license requirements set forth in the EAR continue to apply to this entity and its facilities.

This amendment applies only to transactions under Authorization VEU involving the SMIC AT2 facility. All conditions and restrictions that applied to transactions that were undertaken pursuant to Authorization VEU prior to the effective date of this amendment, and that involved the SMIC AT2 facility, continue to apply to those transactions. These restrictions and conditions include any that were imposed on the SMIC AT2 facility in connection with its eligibility for Authorization VEU, as established by BIS in its communications authorizing the SMIC AT2 facility's participation in the VEU program.

Saving Clause

Shipments of items removed from eligibility for export, reexport or transfer (in-country) under Authorization VEU (*i.e.*, under the designator VEU) as a result of this regulatory action that were on dock for loading, on lighter, laden aboard an exporting carrier, or en route aboard a carrier to a port of export, on [INSERT DATE OF PUBLICATION], pursuant to actual orders for export, reexport or transfer (in-country) to an eligible destination, may proceed to that destination under the previously applicable Authorization so long as they are exported, reexported or transferred (in-country) before [INSERT DATE 15 DAYS AFTER DATE OF PUBLICATION]. Any such items not actually exported, reexported or transferred (in-country) before midnight, on [INSERT DATE 15 DAYS AFTER DATE OF PUBLICATION], require an individual license or other applicable authorization under the EAR.

Since August 21, 2001, the Export Administration Act (the Act) has been in lapse and the President, through Executive Order 13222 of August 17, 2001 (3 CFR, 2001 Comp., p. 783

(2002)), as extended most recently by the Notice of August 12, 2011, 76 FR 50661 (August 16, 2011), has continued the EAR in effect under the International Emergency Economic Powers Act. BIS continues to carry out the provisions of the Act, as appropriate and to the extent permitted by law, pursuant to Executive Order 13222.

Rulemaking Requirements

1. Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been determined to be not significant for purposes of Executive Order 12866.

2. This rule involves collections previously approved by the Office of Management and Budget (OMB) under Control Number 0694-0088, “Multi-Purpose Application,” which carries a burden hour estimate of 43.8 minutes to prepare and submit form BIS-748; and for recordkeeping, reporting and review requirements in connection with Authorization VEU, which carries an estimated burden of 30 minutes per submission. This rule is expected to result in a decrease in license applications submitted to BIS. Total burden hours associated with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA) and OMB Control Number 0694-0088 are not expected to increase significantly as a result of this rule.

Notwithstanding any other provisions of law, no person is required to respond or to be subject to a penalty for failure to comply with a collection of information, subject to the

requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

3. This rule does not contain policies with Federalism implications as that term is defined under Executive Order 13132.

4. There is good cause under 5 U.S.C. 553(b)(B) to waive the provisions of the Administrative Procedure Act (APA) requiring prior notice and the opportunity for public comment because, specific to this rule, they are unnecessary, impracticable, and contrary to the public interest.

In determining whether to grant or revoke VEU designations, a committee of U.S. Government agencies evaluates a variety of information, the nature and terms of which are set forth in 15 CFR Part 748, Supplement No. 8. The criteria for evaluation by the committee are set forth in 15 CFR 748.15(a)(2). The information, commitments, and criteria for this extensive review were all established through the notice of proposed rulemaking and public comment process (71 FR 38313, July 2, 2006, and 72 FR 33646, June 19, 2007). Thus, authorization of a VEU is similar to granting a license: To receive authorization VEU, an application must be submitted on behalf of an entity; the entity must be found to meet certain previously identified criteria; and the application must be approved. Because the authorization granted by BIS pursuant to 15 CFR § 748.15 is similar to that granted to exporters for individual licenses, which do not undergo public review when they are approved, denied, revoked, or amended, allowing public review and comments to this rule is unnecessary.

Publication of this rule in other than final form is unnecessary because the procedure for revocation of a VEU or facility from the Authorized VEU list is similar to the license revocation

procedure, which does not undergo public review. During the revocation procedure, the U.S. Government analyzes confidential business information according to set criteria to determine whether a given authorized VEU entity remains eligible for VEU status. Revocation may, as in this case, be the result of a material change in circumstance at the VEU or the VEU's authorized facility. Examples of such a material change include changes in the operational status of a VEU facility or changes in the end-use of the products produced at the facility. Such changes may result in a VEU or VEU facility no longer meeting the eligibility criteria for Authorization VEU, and may thus lead the U.S. Government to modify or revoke VEU authorization. VEU's or VEU facilities that undergo material changes that result in their no longer meeting the criteria to be eligible VEU's must, according to the VEU program, have their VEU status revoked. Here, National Semiconductor requested removal from the VEU program and SMIC requested that BIS remove the SMIC AT2 facility from the VEU program due to material changes in ownership and control. Consequently, BIS is removing National Semiconductor from the list of "Validated End-Users" and "Eligible Destinations" and removing the SMIC AT2 facility from "Eligible Destinations" in the EAR. Public comments on whether to make these removals are unnecessary.

Additionally, allowing for prior public notice and comment on this rule may be impracticable and contrary to the public interest. The EAR advance U.S. national security, foreign policy, and economic objectives by ensuring an effective export control system. In accordance with the pre-set criteria, the U.S. Government reviews each VEU and its facilities to ensure that exports, reexports and transfers (in-country) of specified items to these entities are consistent with such objectives. Accordingly, VEU's and their facilities may receive through export, reexport or transfer (in-country) items that would otherwise require a license and

transaction-specific review, in part due to national security concerns. However, the VEU and listed facility here are no longer eligible to receive items under Authorized VEU, and in order to protect national security, the restrictions of the EAR must be in place as soon as possible.

Allowing public comments on this rule would hinder the ability of BIS to enforce the EAR's restrictions on exports without a license to the listed facilities. Thus public comment on this rule is both impracticable, because allowing such comment would prevent BIS from undertaking its statutory duties, and contrary to the public's national security interests.

In addition, BIS finds good cause to waive the requirement of 5 U.S.C. 553(d)(3) to delay the effectiveness of this regulation, because such a delay is contrary to the public's interest. When the U.S. Government has been notified of or has identified a material change in circumstances that warrants revocation or modification of VEU status for an end-user or a facility of an end-user, there is a need to quickly alert the public that the facility is no longer authorized as a recipient of items under Authorization VEU. Delaying this action's effectiveness could result in items that otherwise require licenses being exported, reexported, or transferred (in-country), license-free, to an ineligible facility, at risk to national security. Accordingly, it would be contrary to the public interest to delay this rule's effectiveness.

No other law requires that a notice of proposed rulemaking and an opportunity for public comment be given for this final rule. Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule under the APA or by any other law, the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) are not applicable and no regulatory flexibility analysis has been prepared.

List of Subjects in 15 CFR Part 748

Administrative practice and procedure, Exports, Reporting and recordkeeping requirements.

Accordingly, part 748 of the EAR (15 CFR Parts 730 – 774) is amended as follows:

PART 748 – [AMENDED]

1. The authority citation for 15 CFR Part 748 continues to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of August 12, 2011, 76 FR 50661 (August 16, 2011).

2. Supplement No. 7 to Part 748 is amended by:

a. Removing the entire entry for National Semiconductor Corporation; and

b. Removing “Semiconductor Manufacturing International (Chengdu) Corporation, Assembly and Testing (AT2) Facility, 8–8 Kexin Road, Export Processing Zone (West Area), Chengdu, China 611731” from the “Eligible Destinations” column in “China (People’s Republic of)”.

DATED: November 1, 2011

Kevin J. Wolf

Assistant Secretary

for Export Administration

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